
**APPEALS BOARD
UTAH LABOR COMMISSION**

JESSIE C. GONZALEZ,

Petitioner,

vs.

**STAMPIN' UP!, INC. and
WORKERS COMPENSATION FUND,**

Respondents.

**ORDER AFFIRMING
ALJ'S DECISION**

Case No. 06-0748

Stampin' Up!, Inc. and its insurance carrier Workers Compensation Fund (collectively "Stampin' Up") ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Holley's award of benefits to Jessie C. Gonzalez under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Appeals Board exercises jurisdiction over this motion for review pursuant to §63G-4-301 of the Utah Administrative Procedures Act and §34A-2-801(3) of the Utah Workers' Compensation Act.

BACKGROUND AND ISSUE PRESENTED

Mr. Gonzalez claims workers' compensation benefits for an injury to his left shoulder that he suffered on January 20, 2006, while working for Stampin' Up. Stampin' Up admitted liability for Mr. Gonzalez's shoulder injury and assigned him to light duty, but later terminated him for misconduct.

Judge Holley held an evidentiary hearing on the claim and awarded Mr. Gonzalez temporary total disability benefits until the date of medical stability. Judge Holley found that Mr. Gonzalez was entitled to benefits despite his termination. Stampin' Up challenges Judge Holley's decision by arguing that Mr. Gonzalez's temporary total benefits should have ended because his misconduct was a constructive refusal of light duty.

FINDINGS OF FACT

The Appeals Board adopts Judge Holley's findings of fact and summarizes them as follows. On January 20, 2006, Mr. Gonzalez injured his left shoulder while working for Stampin' Up. Mr. Gonzalez began light duty on January 27, 2006, which continued until March 27, 2006, when he attempted to return to regular duty. However, Mr. Gonzalez could not perform his regular duty due to pain in his injured shoulder and was returned to light duty.

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At that point, Dr. Siggard recommended an arthroscopic exam, decompression and a distal clavical excision to treat Mr. Gonzalez's injured shoulder. Mr. Gonzalez accepted the recommendation and scheduled the treatment. Dr. Siggard extended Mr. Gonzalez's light duty restriction on April 12, 2006, with the understanding that he would be restricted from any work until he underwent treatment for his injury. However, Stampin' Up terminated Mr. Gonzalez on April 13, 2006, for sending pornographic images to other employees' cellular phones and company e-mail accounts.

On May 10, 2006, Dr. Siggard treated Mr. Gonzalez's injured shoulder and cleared him to return to work with restrictions as of August 29, 2006. Mr. Gonzalez was eventually released to work without restrictions on October 17, 2006.

DISCUSSION AND CONCLUSIONS OF LAW

Section 34A-2-410 of the Utah Workers' Compensation Act provides that an injured worker is generally entitled to temporary total disability compensation from the date of the accident until the healing period has ended. If an injured worker is released to light duty during the healing period, the employer may choose to provide such work. However, an injured worker cannot escape his or her duty to accept suitable light duty work simply by engaging in misconduct. If an injured worker on light duty intentionally engages in misconduct with the purpose of severing the employment relationship, such misconduct should be viewed as a refusal of light duty.

Stampin' Up argues that Mr. Gonzalez's misconduct constituted a constructive refusal of light duty, thereby terminating his right to temporary total benefits. Stampin' Up asserts that allowing Mr. Gonzalez to continue to receive benefits despite his misconduct would put it in the unfair position of having to choose between overlooking the misconduct or paying temporary total benefits.¹ However, there is no evidence that Mr. Gonzalez intended to sever his employment relationship with Stampin' Up.

While Mr. Gonzalez's misconduct may have warranted his termination, it does not appear that he intended to sever his employment relationship, and he did not otherwise refuse light duty. In fact, Mr. Gonzalez briefly attempted to return to regular duty before pain in his injured shoulder caused him to go back to light duty. The Appeals Board therefore concurs with Judge Holley's determination that Mr. Gonzalez is entitled to temporary total disability compensation for the periods

¹ In 2008, the Utah State Legislature enacted §34A-2-410.5, which allows the Commission to reduce or terminate disability compensation for good cause if the employer terminates the injured worker from the reemployment, and if the termination is reasonable, for cause and the result of criminal or violent conduct, or a violation of a reasonable, written workplace health, safety, licensure, or nondiscrimination rule that is applied in a manner that is reasonable and nondiscriminatory. However, because Mr. Gonzalez's claim arose prior to the enactment of this provision, it must be decided under the law in effect at the time of his injury.

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of April 12, 2006, to May 9, 2006, and August 29, 2006, to October 16, 2006, for a total of 11 weeks.

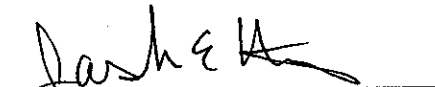
ORDER

The Appeals Board affirms Judge Holley's decision.

Dated this 22nd day of January, 2009.
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Colleen S. Colton, Chair


Patricia S. Drawe


Joseph E. Hatch

NOTICE OF APPEAL RIGHTS

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.